

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

NOVEMBER 1995 SESSION

**FILED**  
March 22, 1996  
Cecil W. Crowson  
Appellate Court Clerk

STATE OF TENNESSEE,

Appellee,

VS.

JOSEPH MICHAEL SHELTON,

Appellant.

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C.C.A. NO. 01C01-9505-CC-00144

RUTHERFORD COUNTY

HON. JAMES K. CLAYTON, JR.,  
JUDGE

(Aggravated Burglary; Especially  
Aggravated Kidnapping)

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FOR THE APPELLEE:

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OPINION FILED: \_\_\_\_\_

**AFFIRMED**

JOHN H. PEAY,  
Judge

## OPINION

The defendant was indicted for aggravated burglary and especially aggravated kidnapping. On May 24, 1994, he was found guilty at a jury trial on both charges. The trial court sentenced the defendant to sixteen years for especially aggravated kidnapping and to three years for aggravated burglary. The sentences were ordered to run concurrently. In this appeal as of right the defendant challenges the sufficiency of the convicting evidence for especially aggravated kidnapping, the use of the victim's uncorroborated eyewitness testimony to support the convictions, and the trial court's failure to exercise its role as thirteenth juror. We find that the defendant's issues lack merit, and his convictions are therefore affirmed.

The principal proof offered at trial connecting the defendant with the charges was the testimony of the victim, Rebecca Kelsey. Kelsey testified that at approximately 3:00 p.m. on August 4, 1993, a man, whom she later identified as the defendant, had knocked on the door of her home and had asked if she had a car for sale. When she replied that she did not, the defendant asked to use her phone. Before Kelsey could hand him her portable phone, the defendant brandished a handgun, yelled "vice" and told her to lie on the floor. Once the victim was on the floor, she saw two other men, both armed with handguns, enter her home. One of these two men asked the victim "where's the money," and they began to search the home. At this time the defendant pulled Kelsey up by her arm, seated her in a chair, and held a handgun next to her head. The other two men then threatened "to go outside and get a shocker" to make the victim reveal the location of money in the home.

After approximately twenty minutes, the defendant ordered Kelsey to get

down on all fours and to crawl to a back bedroom. As she crawled down the hall to the bedroom, the defendant walked behind her holding his gun to the back of her head. The other two men followed behind the defendant. Once they had arrived at the bedroom, the defendant pushed the victim onto her stomach on the floor and ripped the telephone cords out of the wall. Kelsey told the men that the only money she had was in her purse next to her bed, and one of the men began to search through her purse. At this time, the defendant pulled the sheet and the comforter off the bed and wrapped them around the victim's head, ostensibly to prevent her from seeing the men clearly.

After about ten more minutes of searching the bedroom, the defendant removed the sheet and the comforter from Kelsey's head and walked her back down the hall to the living room, holding a gun to her the entire way. The other two men again followed them down the hall. Along the way, one of those men mentioned that they were going to "wait till your boyfriend gets here." Upon reaching the living room, the defendant made the victim sit down in a chair and bound her with duct tape from her home. He taped her arms behind her back, around her shoulders down to her waist, her legs, her eyes and her mouth. Once Kelsey had been taped, the three men left the living room and went to a back room in the home. Kelsey stood up and hopped to the kitchen, found a knife, and managed to cut herself free of the tape. She then ran out of her home to a neighbor's house. After police officers had arrived, Kelsey told them that the man who had first entered her home was the defendant. She later identified the defendant from a photographic spread.

On cross-examination, Kelsey stated that she had seen the defendant for about twenty minutes approximately one year before the incidents charged in the indictment had taken place. According to her testimony, the defendant came to her home

to speak with her boyfriend about employment opportunities. Kelsey also testified that she had not seen the defendant at any of the convenience markets at which she had worked for nearly seven years. She testified further, however, that she had recognized the defendant almost immediately after he had entered her home on the afternoon of the alleged offenses.

Bill Sims, the neighbor to whose house Kelsey had run after freeing herself from the duct tape, testified that the victim had arrived at his home at approximately 5:30 p.m. on the evening of August 4, 1993. When she arrived, she was covered in duct tape, had a knife in her hand and was hysterical. Sims attempted to calm Kelsey and called the police. On cross-examination, Sims testified that his dogs usually bark at cars driving through the neighborhood, but he had not heard them barking on the afternoon of the offenses. Sims testified further that he had looked at the victim's home often until the police had arrived, but he had not seen anyone at or leaving the home.

Darrell Long, a deputy with the Rutherford County Sheriff's Department, testified that he had arrived at Bill Sims' home at approximately 5:45 p.m. on August 4, 1993. Long observed that Kelsey had duct tape on her body and that she was extremely upset. He searched the area surrounding Kelsey's home but found no individuals fitting Kelsey's description of the perpetrators. Detective Jimmie Davis of the Rutherford County Sheriff's Department testified that, although the home appeared thoroughly ransacked, he had not attempted to take any fingerprints from the scene because the cloth and wood surfaces found in Kelsey's home do not generally yield worthwhile prints. On cross-examination, Davis testified that in spite of Kelsey's identification of the defendant as one of the perpetrators, he had not made an arrest because he felt he needed more information. In addition, Davis stated that Kelsey, contrary to her testimony

at trial, had initially told him that she knew the defendant because he had come into a convenience market at which she had once worked.

The defendant testified at trial that he was acquainted with Kelsey because he had been to her home on a few occasions while visiting his half-brother, who lives near Kelsey. With regard to his activities on August 4, 1993, the defendant testified that he stayed throughout the day in the trailer park in which he and his mother were living. He mowed grass around the trailer park most of the morning and hung doors in the trailer park in the afternoon with two other men.

Although neither of the two men with whom the defendant had allegedly hung doors was located for testifying at the trial, the defendant's mother, Linda Pope, did confirm his testimony. Pope stated that she had remained at the trailer park throughout the day. She testified further that the defendant had mowed grass in the morning and had hung doors with two acquaintances until 5:30 or 6:00 p.m. On cross-examination, however, Pope admitted that she had initially told officers investigating the matter that she and her son had been at a lake all day.

In his first issue, the defendant challenges the sufficiency of the evidence of his conviction for especially aggravated kidnapping. Specifically, he contends that the movement and detention of the victim were essentially incidental to the accompanying aggravated burglary and were therefore insufficient to support a separate conviction, citing State v. Anthony, 817 S.W.2d 299 (Tenn. 1991). The defendant compares his situation to a number of cases in which Tennessee courts have not upheld separate

kidnapping convictions.<sup>1</sup> He argues that although the victim was forced to move around within her home and was eventually bound with duct tape, these acts were clearly incidental to the commission of the burglary. The defendant points out that the victim was not harmed during the incident and contends that the confinement was no more than necessary to complete the burglary and to escape.

Initially we note that the defendant's first issue does not challenge the proof as to the elements of each offense involved in this case. Instead, the defendant questions the propriety of convicting him of both especially aggravated kidnapping and aggravated burglary when each offense arose out of the same criminal episode. Although Tennessee's kidnapping and burglary statutes obviously survive the scrutiny of a "Blockburger test", the Tennessee Supreme Court held in Anthony that traditional double jeopardy analysis is inadequate to resolve this issue. Anthony, 817 S.W.2d at 306. Instead, the Court stated that the test applicable to the defendant's situation is "whether the confinement, movement, or detention is essentially incidental to the accompanying felony and is not, therefore, sufficient to support a separate conviction for kidnapping, or whether it is significant enough, in and of itself, to warrant independent prosecution and is, therefore, sufficient to support such a conviction." Anthony, 817 S.W.2d at 306. Our Supreme Court explained that "one method of resolving this question is to ask whether the defendant's conduct 'substantially increased [the] risk of harm over and above that necessarily present in the crime of robbery itself.'" Anthony, 817 S.W.2d at 306 (citation omitted). The Court concluded that Tennessee's kidnapping statute should be narrowly applied "so as to make its reach fundamentally fair and to protect the due process rights of every citizen, even those charged with robbery, rape,

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<sup>1</sup> The defendant cites the following additional cases in support of his argument: State v. Coleman, 865 S.W.2d 455 (Tenn. 1993); State v. Gregory, 862 S.W.2d 574 (Tenn. Crim. App. 1993); State v. Sanders, 842 S.W.2d 257 (Tenn. Crim. App. 1992); and State v. Tommy King, C.C.A. No. 01C01-9111-CC-00334, Rutherford County (Tenn. Crim. App. filed August 13, 1992, at Nashville).

or the like." Anthony, 817 S.W.2d at 306.

Applying the Anthony analysis to the facts of this case, we can only find that there is sufficient evidence to support the defendant's kidnapping conviction. While the kidnapping was certainly related to the burglary in the sense that they arose out of the same criminal episode, it was not essentially incidental to the burglary. In the case at bar, the victim was forced at gunpoint to move about her home while her assailants threatened to use physical violence to make her reveal the location of any money in the home. Telephone cords were torn from the wall of her bedroom, ostensibly to prevent her from calling for help. She was eventually bound with duct tape, and the intruders stated their intention to remain in the home with her captive until her boyfriend returned. In all, the victim was confined for a period of up to two and a half hours. This series of events substantially increased the risk of harm beyond that necessarily present in the burglary itself. See Anthony, 817 S.W.2d at 306. Accordingly, the confinement of the victim was not essentially incidental to the burglary and was sufficiently significant to support the defendant's kidnapping conviction.

Furthermore, although the defendant goes to great lengths to compare his situation to Anthony and its progeny, our review of the record indicates that the case at bar is quite different from those cases which the defendant cites. Apart from the factual differences regarding the duration of confinement<sup>2</sup> and the increased risk of harm<sup>3</sup>, the principal distinction rests upon the fact that Anthony and its progeny involve the crimes

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<sup>2</sup> In Anthony, for example, the criminal acts took no more than five minutes. See Anthony, 817 S.W.2d at 301-302. In the case at bar, the victim was confined for a period of up to two and a half hours.

<sup>3</sup> In Sanders, for example, this Court specifically found that the detention of the victim did not create a risk substantially greater than that necessarily involved in the crime of robbery. See Sanders, 842 S.W.2d at 260. In the case at bar, however, the detention and movement of the victim certainly increased the risk of harm beyond that necessarily present in the crime of burglary.

of rape, robbery, and murder as the felonies accompanying the kidnapping convictions. See, e.g., Anthony, 817 S.W.2d at 301-302; Coleman, 865 S.W.2d at 456-457; Gregory, 862 S.W.2d at 575-576; Sanders, 842 S.W.2d at 258-259. The present case, on the other hand, involves the crime of burglary. Aside from the obvious distinction that burglary is an offense against property whereas rape, robbery and murder are offenses against persons, the crime of burglary is notably different with regard to the issue of confinement. In contrast to crimes such as rape and robbery, the offense of burglary does not by its very nature necessarily involve any degree of confinement or detention whatsoever. As a result, we can foresee very few, if any, situations in which it can be said that the detention or confinement of an individual was incidental to the commission of a burglary. Certainly the facts of the case at bar reveal that it is not one of those situations. The defendant's first issue is therefore without merit.

In his second issue, the defendant challenges the sufficiency of the evidence for both his especially aggravated kidnapping conviction and his aggravated burglary conviction. Specifically, he contends that because the only proof offered at trial linking him to the offenses was the uncorroborated testimony of the victim, the evidence supporting his convictions is legally insufficient. The defendant does, however, concede that current Tennessee law concerning the standard of review of the sufficiency of the evidence based on eyewitness identification weighs against his argument. In State v. Strickland, this Court held that the testimony of a victim identifying the perpetrator is sufficient in and of itself to support a conviction. State v. Strickland, 885 S.W.2d 85, 87-88 (Tenn. Crim. App. 1993). Hence, the defendant urges this Court to adopt a new rule of law which would require, in the name of fundamental fairness, that eyewitness testimony be corroborated in much the same way that accomplice testimony must be corroborated. We decline to alter current Tennessee law regarding the sufficiency of

eyewitness testimony.

In Tennessee, when an accused challenges the sufficiency of the convicting evidence, we must review the evidence in the light most favorable to the prosecution in determining whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). We do not reweigh or re-evaluate the evidence and are required to afford the State the strongest legitimate view of the proof contained in the record as well as all reasonable and legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Questions concerning the credibility of witnesses, the weight and value to be given to the evidence, as well as factual issues raised by the evidence are resolved by the trier of fact, not this Court. Cabbage, 571 S.W.2d 832, 835. A guilty verdict rendered by the jury and approved by the trial judge accredits the testimony of the witnesses for the State, and a presumption of guilt replaces the presumption of innocence. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973).

In addition, as the defendant concedes, it is a well-established principle of law in Tennessee that the credibility of eyewitness testimony linking the defendant to the criminal offense for which he stands trial is a question of fact for the determination of the jury upon consideration of all competent proof. Strickland, 885 S.W.2d at 87 (citing State v. Crawford, 635 S.W.2d 704, 705 (Tenn. Crim. App. 1982)). Moreover, the testimony of the victim identifying the defendant as the perpetrator of an offense is itself sufficient to support a conviction. See Strickland, 885 S.W.2d at 87; State v. Williams, 623 S.W.2d 118, 120 (Tenn. Crim. App. 1981).

In the present case, the victim identified the defendant by name shortly after the commission of the offenses. She later identified the defendant from a photographic lineup. Although the defendant presented an alibi defense, the verdict of the jury accredits the victim's testimony. From a review of the entire record, we can only conclude that the evidence is sufficient, as a matter of law, for a rational trier of fact to find the defendant guilty beyond a reasonable doubt. The defendant's second issue is therefore without merit.

In his third issue, the defendant challenges the trial court's fulfillment of its role as thirteenth juror. He contends that the trial court misconceived its duty to weigh the evidence independently. Specifically, the defendant points to the following language of the trial court in its ruling upon the motion for a new trial:

And although I had some doubt, I didn't have a reasonable doubt about it. Had I deliberated with the jury, I'm satisfied I would have settled my reasonable doubt as they did -- or settled my doubt. I shouldn't say reasonable doubt because I didn't have any reasonable doubt.

The defendant claims that the trial judge's use of "had I deliberated" indicates that he did not independently weigh the evidence. As a result, the defendant argues that he should receive a new trial, citing State v. Moats, C.C.A. No. 03C01-9302-CR-00038, Knox County (Tenn. Crim. App. filed May 2, 1994, at Knoxville), aff'd 906 S.W.2d 431 (Tenn. 1995), in support of his argument.

Under Tenn. R. Crim. P. 33(f), the thirteenth juror rule, the trial judge is empowered to grant a new trial if he or she views the verdict to be contrary to the weight of the evidence. The trial court's approval of the verdict under this rule is a necessary prerequisite to the imposition of a valid judgment. State v. Carter, 896 S.W.2d 119, 123

(Tenn. 1995); Curran v. State, 157 Tenn. 7, 4 S.W.2d 957, 958 (1928).

It is the duty of this Court to review the action of the trial court under the thirteenth juror rule. If the trial court disagrees with the verdict or expresses its dissatisfaction with the verdict, it is error for it to fail to grant a new trial. See Helton v. State, 547 S.W.2d 564, 566 (Tenn. 1977). "An appellate court may presume that the trial court has acted as the thirteenth juror and approved the jury's verdict where the trial court simply overrules a motion for new trial without any explicit statement that it has independently weighed the evidence and agrees with the jury's verdict." Carter, 896 S.W.2d at 119. When the trial judge approves the verdict by entering judgment and denying a new trial motion, our review is limited to the legal sufficiency of the evidence. See State v. Draper, 800 S.W.2d 489, 499 (Tenn. Crim. App. 1990). Before considering the sufficiency of the evidence, however, we must first assure that the trial court properly performed its mandatory duty as thirteenth juror. See Carter, 896 S.W.2d at 122.

By focusing so heavily on the phrase "had I deliberated," the defendant overlooks the majority of the trial court's language in addressing his motion for a new trial. The trial court found the victim's testimony to be credible, especially with regard to her identification of the defendant. Specifically, the trial court stated that the victim "didn't answer your [defense counsel] questions very well, I agree with that. She was about as argumentative with counsel as a person could be. However, she was very positive of her identification." Moreover, the trial judge concluded that he had no reasonable doubt as to the defendant's guilt. Although the three words "had I deliberated" might, if taken alone, lend the subtle impression that the trial judge affirmatively abdicated his duty as thirteenth juror, the remainder of his ruling on the defendant's motion for a new trial clearly demonstrates that he fully weighed the evidence and, based on his lack of

reasonable doubt, found the defendant guilty. From our review of the entire record, we conclude that the trial judge did in fact act as thirteenth juror, and that there is sufficient evidence to support both the jury's verdict and the trial court's approval of that verdict. The defendant's third issue is therefore without merit.

For the reasons set forth in the discussion above, we find that the defendant's issues on appeal lack merit. The judgment of the trial court is hereby affirmed.

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JOHN H. PEAY, Judge

CONCUR:

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JOE B. JONES, Presiding Judge

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JOSEPH H. WALKER, III, Special Judge